IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

NO. 286

W. M. MILES and EDITH P. MILES,
his wife, et al,
Petitioners,

—vs.—

LAURIE W. TOMLINSON, District Director
of Internal Revenue for the District of Florida,
Respondent.

PETITION FOR REHEARING ON DENIAL OF WRIT OF CERTIORARI

To The Honorable, The Chief Justice and Associate Justices of The Supreme Court of The United States

Your petitioners, W. M. Miles and Edith P. Miles, his wife, H. E. Pontius and Lovina B. Pontius, his wife, and Ralph A. Marsicano and Marie B. Marsicano, his wife, respectfully pray unto the Court for a rehearing of the order of this Court dated October 14, 1963, denying their Petition that a Writ of Certiorari issue to review the holding entered in this cause by the United States Court of Appeals for the Fifth Circuit.

SPECIFIC ISSUE TO WHICH THE REHEARING IS DIRECTED

There is a basic issue on which new light has been shown since the filing of our petition for certiorari. This question is—

> Can a court of appeals, *as a matter of law*, reverse the finding of the trial court that a corporation—
>
> "owned no property, received no income, never received funds in which it had any beneficial interest or which it had any right to retain or against which it had any legal or equitable claim."
>
> (Paragraph 15 of the findings of fact of the trial court, R. 417).

The court of appeals did not determine that such a finding was "clearly erroneous" based on the record. It determined that such a finding could not be made as a matter of law, and that the tax consequences of transactions in property do not follow "ownership" as found by the trial court; but rather, the tax consequences must follow the predilections of the court of appeals for some different result.

No other court has ever so held.

As was pointed out in our petition for the writ in much greater detail, all other courts have consistently held to the contrary.

REASON FOR REHEARING AND ARGUMENT

The brief for the respondent in opposition declares—

> "The decision of the court of appeals in this case is based on well-established principles of federal tax law. There are no conflicting decisions . . . " (p.7)

Since the filing of our petition for certiorari there has been republished, with annotations and supplemental discussions bringing it up to date, a leading and basic legal treatise on the subject of "The Corporate Entity in Tax Cases." Republished as a "Tax Classic" in the Tax Counselor's Quarterly for September, 1963 (Vol. 7, No. 3), this article by George E. Cleary supplemented by the work of Christian M. Lauritzen, II, clearly shows that the pronouncement of respondent, quoted above, is not the truth.

The Cleary article was originally published on the first pages of the first issue of the first volume of Tax Law Review in 1945. As Mr. Lauritzen says,

> "Mr. Cleary's analysis of the tax problems involving the corporate entity is as brilliant and valid today as when it was written. Recent cases merely serve to emphasize the various propositions which he developed in his classic article," (Tax Counselor's Quarterly, September, 1963 (Vol. 7, No. 3, p. 377)).

The important part of the Cleary article to be considered here, is its reference to cases which are actually outside the scope of the subject matter of the article.

> "There is one class of cases, which is really not an exception to the general rule, where the courts have recognized that a corporation, like any other nominee or agent, may hold title for or perform acts for its stockholder. Where the fact can be proved that the corporation was merely holding record title and was not the beneficial owner or that it acted solely as agent for its stockholder, these facts will not be ignored.
>
> [Stewart Forshay, 20 BTA 537 (1930); Comm'r v. Moro Realty Holding Corp., 65 F2d 1013 (CCA 2d, 1933); affirming 25 BTA 1135 (1932); Thrift Real-

ty Co., 29 BTA 545 (1933); 112 West 59th Street Corp. v. Helvering, 68 F2d 397 (App DC 1933); North Jersey Title Ins. Co. v. Comm'r, 84 F2d 898 (CCA 3d, 1936); Mark A. Mayer, 36 BTA 117 (1937); Abrams Sons' Realty Corp., 40 BTA 653 (1939); Archibald R. Watson, 42 BTA 52 (1940); Carling Holding Co., 41 BTA 493 (1940); Woods Lumber Co., 44 BTA 88 (1941); United States v. Brager Building & Land Corp., 124 F2d 349 (CCA 4th, 1941); Lewis Eugene Grigsby Trust, 5 TC No. 7 (1945); The Income Tax Status of the Agency Corporation, 21 Taxes 652 (1943)] (at pp. 361-362).

To be successful in such a case it is necessary for the taxpayer to prove that the corporation has not done the business or held the property for its own account and has consistently been treated as a mere agent or conduit for tax purposes and for other purposes.

[Cf. Comm'r v. Court Holding Company, 324 US 331 (1945) (in which a sale in form made by the stockholders was held to have been made in fact by the corporation)] (at p. 362).

"This principle is well illustrated in the recent case of Paymer v. Commissioner."

[150 F2d 334 (CCA 2d, 1945)]. (at p. 362).

"The decision in the Moline Properties case, which was subsequent to most of the cases referred to above, indicates how strict the courts will be in refusing to permit the corporate entity to be disregarded by the taxpayer. Even since that decision, however, *it seems clear that a corporation may act merely as nominee title holder or agent for its stockholder*, but the taxpayer must prove a clear case and a consistent course of conduct to come within this principle." (Emphasis added) (at p. 363).

Thus, the article concludes—

> "It may be possible for taxpayers to prove in particular cases that the corporation acted merely as nominee or holder of record title or as agent for its stockholders, so that the stockholder is the real party in interest or the corporation is a mere sham. [Paymer v. Comm'r, 150 F2d 334 (CCA 2d, 1945)]. *The application of such a principle does not involve disregard of the corporate entity but rather proof as to what the transaction in fact was.*" (at p. 374) (Emphasis added).

Bringing the entire matter of the corporate entity down to date, Mr. Lauritzen re-summarized the subject of "Mere Title Holding Corporations", although in terms slightly different from those approved by Mr. Cleary:

> "If a corporation is a dummy which *does nothing more than hold title to property*, then the corporate entity can be disregarded. (Moot v. Commissioner, TC Memo Opinion 105520 (November 4, 1942); U. S. v. Jelenko, 23 F2d 511 (1927); Thompson v. United States, 110 F2d 585 (1940); Forshay v. Commissioner, 20 BTA 537; and Rae v. Commissioner, BTA Memo No. 107371 (September 25, (1942)). (Seattle Hardware Company v. Squire, 83 F Supp 106 (1948); K-C Land Company, Inc., TC Memo 1960-35 (1960))." (at p. 392) (Emphasis added).

In the instance case, the taxpayers proved—and the trial judge unequivocally *found* that they proved—precisely what Professor Cleary said should be proved. The court of appeals found no error in the trial court's finding of ownership.

Thus, for the first time, and contrary to all decided cases on the subject, a tax has been imposed on transactions in property where the taxpayer has been judi-

cially determined to have *no ownership* in the property from which gains were derived. This goes to the foundations of taxation. (*See Poe v. Seaborn*, 282 US 101, 75 L.ed 239: "The use of the word 'of' denotes ownership." US at p. 109; L.ed at p. 243).

Under the circumstances we simply cannot understand the government's attitude. Review by this Court should be welcomed to settle the multitude of cases which have been generated into litigation by the taxing agency's effort to overrule *Paymer v. Commissioner*, 150 F2d 334, CA 2, 1945, and the numerous Tax Court and other cases following the same doctrine.

To try to slip this one by as being "based on well-established principles of federal tax law", serves no useful purpose, prolongs the litigation of tax controversies, and frustrates the administration of justice under tax law.

We respectfully urge the Court to reconsider its denial of the writ, to let the writ issue, and to order the relief prayed for in our petition for the writ.

Respectfully submitted,

George W. Ericksen

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CERTIFICATE

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and it is restricted to the grounds specified in Rule 58 of the rules of this Court.

George W. Ericksen

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AFFIDAVIT OF SERVICE

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH:

BEFORE ME, the undersigned authority, this day personally appeared GEORGE W. ERICKSEN, who being first duly sworn says that he is counsel for the Petitioners in this cause, and that he did furnish copies of the foregoing Petition for Rehearing on Denial of Writ of Certiorari to ARCHIBALD COX, Solicitor General of the United States, Department of Justice, Washington 25, D. C., and LOUIS F. OBERDORFER, Assistant Attorney General of the United States, Department of Justice, Washington 25, D. C., by *Air Mail*, and to EDWARD F. BOARDMAN, United States Attorney, 409 Federal Building, Tampa, Florida, in an envelope addressed to said attorneys as aforesaid with sufficient United States postage thereon to insure delivery, on the day of October, 1963.

George W. Ericksen

Sworn to and subscribed before me, this day of October, 1963.

Notary Public, State of Florida at Large

My Commission expires: